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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 United States of America,) CV 12-08237-PCT-DGC (MHB)
10 Plaintiff,) CR 06-626-PCT-DGC
11 v.) **SUPPLEMENTAL REPORT**
12 Kenderick Begay,) **AND RECOMMENDATION**
13 Defendant/Movant.)
14

15 TO THE HONORABLE DAVID G. CAMPBELL, UNITED STATES DISTRICT JUDGE:

16 On November 28, 2012, Movant Kenderick Begay, who is confined in the United
17 States Penitentiary in Pollock, Louisiana, filed a Motion Under 28 U.S.C. § 2255 to Vacate,
18 Set Aside, or Correct Sentence by a Person in Federal Custody (hereinafter “§2255 motion”),
19 a Memorandum in Support of the Motion, and a Motion to Appoint Counsel.¹ (CV12-8237
20 (“CV”) Docs. 1-3; CR 06-00626 (“CR”) Docs. 111-113.) Plaintiff United States of America
21 (the “Government”) filed its Response on March 15, 2013, and Movant filed his reply on
22 April 17, 2013. (CVDocs. 6, 7.) On August 16, 2013, this Court filed a Report and
23 Recommendation recommending that Movant’s §2255 motion be denied. (CVDoc. 8.)
24 Movant thereafter filed Objections to this Court’s findings and recommendations as to three
25 of his eleven claims. (CVDoc. 11.)
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28 ¹The motions and memorandum were all filed by attorney Dan Drake, on Movant’s
behalf. On January 22, 2013, the Court appointed Mr. Drake to represent Movant. (CV Doc.
5.)

After filing his Objections, Movant moved for, and on November 5, 2013, presiding District Court Judge Campbell granted an expansion of the record to include evidence of pawn transactions, and referred the case to undersigned “for consideration of the expanded record.” (CVDoc. 15.) Judge Campbell found that two documents submitted in support of the motion to expand were “relevant to the consideration of Movant’s ineffective assistance of counsel claims.” (*Id.*, at 3.) Those documents consisted of (1) an FBI agent report documenting a 2002 interview of Movant, during which he provided the agent several pawn shop tickets relating to the pawning of firearms, and (2) a T&R Market pawn shop ticket indicating Movant pawned a Norinco SKS rifle on January 5, 2002. (CVDocs. 12-1, 12-2.)

Movant filed several discovery motions between November 14, 2013 and January 30, 2014. (CVDocs. 16, 22, 27.) Movant also moved for, and was granted a deposition of Movant’s trial counsel. (CVDocs. 35, 39, 41.) On July 8, 2014, Movant filed a Supplement to Claim and Motion to Amend and Supplement, in which he supplements claims one and nine in his §2255 motion that (1) trial counsel rendered ineffective assistance by failing to investigate an alternative shooter (Alfred Bennie Lee Jr.) theory of defense, and (2) trial counsel rendered ineffective assistance by failing to investigate and present evidence that Movant did not have access to the weapon used in the murder (pawn shop evidence). (CVDoc. 65.) On August 4, 2014, the Government filed its Response to Movant’s Supplement. (CVDoc. 67.) This Court ordered that no reply be filed without an order from the Court, and no order was issued. (CVDoc. 63.)

BACKGROUND²

A. Statement of Facts - Trial.³

²This Court repeats the background from the original Report and Recommendation for the convenience of the reader.

³The statement of facts are derived from the 9th Circuit *en banc* Opinion, affirming Movant’s conviction on appeal, unless otherwise noted. *See, United States v. Begay*, 673 F.3d 1038 (9th Cir. 2011), cert. denied, 132 S. Ct. 754, 181 L. Ed. 2d 508 (2011). (CRDoc. 110.)

1 In the early morning hours of March 28, 2002, Movant left a party in Greasewood,
2 Arizona driving his truck, with passengers Loren Clark, Jessica Lee, Emmanley Begay (no
3 relation to Movant), and Movant's sister Mecheryl Begay. Only Loren Clark and Jessica
4 Lee testified in Movant's trial (hereinafter "Lee" and "Clark"). According to Clark, around
5 2:00 a.m., Movant drove passed the victims, J.T.⁴ and O.C., driving in the opposite
6 direction. Movant flashed his truck lights at their vehicle, and both vehicles pulled off of
7 the highway and parked on a dirt side road. Movant got out of his truck and stood for a
8 minute by the driver-side door of J.T. and O.C.'s vehicle. He then walked back to his
9 truck, retrieved a rifle⁵, walked back to the passenger side of the victim's vehicle and fired
10 eight or nine shots into the vehicle. Movant walked back to his vehicle and placed the gun
11 under the back seat. As Movant walked back to his truck, Mecheryl began screaming and
12 making horrible cries, asking him "What did you do?" or "Why did you do that?" Movant
13 told his sister to be quiet. Clark was outside Movant's vehicle, having exited to relieve
14 himself, and asked Movant why he had shot the victims.⁶ Movant did not respond.
15 Movant, Clark and Mecheryl drove away, leaving Lee behind. Prior to the shooting, Lee
16 was in the rear of Movant's truck in a comatose state having consumed too much alcohol.
17 The gunshots aroused her, at which point she exited the vehicle to vomit.⁷ As she walked
18 away from the scene, Lee observed O.C. attempting to hold J.T. upright and that J.T. had
19 blood on his shirt.

22 ⁴Because the victims were minors, they are referred to using only their initials. See
23 18 U.S.C. § 3509(d).

24 ⁵Testimony at trial indicated that the bullets recovered from the scene were .30 caliber
25 and could have been fired from many different types of rifles. (CRDoc. 91, at 75, 88, 113.)

26 ⁶The transcript of the trial reflects that Clark testified that he asked Movant "what the
27 hell are you doing," not why he "shot the victims." (CRDoc. 91, at 141.)

28 ⁷She did not observe the shootings, but heard the gunshots, and heard Mecheryl
screaming and crying.

1 O.C. drove to the home of Clark's mother to seek help. By that time, J.T. was
2 already dead. O.C. was thereafter transported to a local hospital before being transferred
3 to a hospital in New Mexico. O.C. died from her wounds three days later.

4 The FBI and Navajo investigators began investigating the murders but initially
5 failed to make any significant progress. Witnesses interviewed denied being out on the
6 night of the homicides⁸, and Movant told investigators that he was with his girlfriend the
7 entire night. Investigators located the crime scene two weeks after the homicides and
8 located glass and six .30 caliber shell casings on the ground.

9 Six months later, in the Fall of 2002, Lee contacted the FBI and told them (over the
10 course of several months - see fn 8), and later testified at trial, that she had been at a party
11 that night with Movant, Mecheryl Begay, Clark, and Emmanley Begay. She admitted to
12 drinking and that her memory had been impaired, but that she did remember leaving the
13 party with the group. Lee stated she had passed out in the vehicle, but awoke upon hearing
14 gunshots. She saw the victims after they had been shot. Lee testified that a few days after
15 the murders she asked Movant what she should tell the police about the murders, and
16 Movant told her to blame it on two other men. Lee and Movant never spoke again.

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19 ⁸In fact, both Clark and Lee, when initially contacted denied knowledge of the events.
20 Clark stated to the FBI on March 29, 2002, that Movant had pawned all of his guns, and
21 stated in an April 8, 2002, interview that he ran into Movant after the homicides and had a
22 "sickening feeling that Movant was involved." (CRDoc, 93, at 15-20.) Clark did not admit
23 the facts he testified to at trial until May, 2006. (*Id.*, at 21.) Movant was not indicted until
24 June 27, 2006. (CRDoc. 1.) Lee contacted the FBI several months after the homicides after
25 seeing the phone number on a reward poster, and initially denied knowing who was
26 responsible for the homicides as she was highly intoxicated and had a "foggy memory," and
27 suggested that the FBI contact Mecheryl Begay, Ervin Begay, Halbert Yazzie, and Alfred
28 Bennie Lee because there were rumors in the community that they were involved in the
homicides. (CRDoc. 93, at 34-38, 46-50, 53) Lee testified at trial that it wasn't until several
contacts with the FBI, and approximately **19 months** after the homicides that Lee "told the
truth" and implicated Movant. (*Id.*, at 59-61.) Lee also testified at trial that Movant had
urged her to say, when asked, that either Ervin Begay, Halbert Yazzie or Alfred Bennie Lee
were the ones who committed the crimes. (*Id.*, at 44-45.)

1 The next break in the investigation came four years after the shootings, in May
2 2006, when the FBI re-contacted Clark, and he implicated Movant for the first time.
3 Although Lee only witnessed the shooting's aftermath, Clark was the sole witness to testify
4 to the events leading up to the shooting itself. Clark testified at trial that he had attended
5 a party the night of the shootings with Movant and other friends. Clark, Movant and the
6 friends left the party and got into a truck driven by Movant. Clark recalled Movant pulling
7 his vehicle off the road, at which time Clark exited the vehicle to relieve himself. He stated
8 that he observed Movant from a distance, appearing simply as "a black figure" in the night,
9 walk initially to the victims' car, stand by the car for a minute or two, then walk back to his
10 truck and retrieve an object from the driver's side, and then walk back to the victims' car.
11 He saw Movant lift the object he had retrieved from the truck up to his shoulder and then
12 heard gunshots and saw sparks. Clark recognized the gunshots coming from a rifle that
13 Movant had used on previous occasions when he and Clark had gone shooting together.

14 When the gunfire ceased, Clark asked Movant why he shot the victims, but Movant
15 did not respond.⁸ Movant simply told Clark to get back into the truck. Later that night
16 when Movant dropped Clark off at his house, Movant told Clark to keep quiet. The next
17 morning, Movant told Clark not to say anything to the FBI, and to "watch himself."
18 Movant also told Clark to "watch his back" several times after the shootings.

19 Movant proceeded to trial and, on June 26, 2007, was convicted of two counts of
20 First-Degree Murder, and two counts of Using, Brandishing, or Discharging a Firearm in
21 Relation to a Crime of Violence. (CRDoc. 66.) Movant was sentenced to life
22 imprisonment on the murder counts, to be followed by consecutive sentences of 120-
23 months and 300-months, for a total of 35-years for the firearms convictions. (CR Doc. 70.)

24 B. Statement of Facts - Appeal.

25 Movant appealed his conviction and sentence. (CR Doc 71.) A three-judge panel
26 reversed the murder convictions on grounds of insufficient evidence, affirmed the firearms
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28 ⁸See, fn 5, supra.

convictions, and found that the trial court did not err in admitting at trial evidence of Movant's intimidation of witnesses Clark and Lee. United States v. Begay, 567 F.3d 540, 550 (9th Cir. 2009), cert. denied, 132 S. Ct. 754 (2011). The case was reheard *en banc*, and the panel affirmed Movant's convictions. United States v. Begay, 673 F.3d 1038 (9th Cir. 2011). The panel reversed the 3-judge panel's finding that there was insufficient evidence presented at trial of premeditation, and found without merit Movant's claims that (1) the district court erred when it refused to instruct the jury on a lesser included offense of voluntary manslaughter; (2) the evidence that Movant intimidated Clark and Lee was inadmissible under Federal Rules of Evidence 403 and 404(b); and (3) the prosecutor engaged in misconduct by misstating the elements of premeditation during closing argument. Id.

C. Motion under 28 U.S.C. §2255 - Supplemental Evidence.

Movant raised eleven claims in his §2255 motion. This supplemental report and recommendation only addresses claims one and nine - ineffective assistance of counsel claims- as Movant asserts that, since the filing of the original report and recommendation, additional evidence has surfaced in support of these claims.⁹

STANDARD

The two-prong test for establishing ineffective assistance of counsel was set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To prevail on an ineffective assistance claim, a convicted defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See id. at 687-88. There is a strong presumption

⁹18 U.S.C. §2255 requires the court to hold an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." See, United States v. Burrows, 872 F.2d 915, 917 (9th Cir. 1989) (citations omitted) (an evidentiary hearing is usually required if a claim is based on matters outside the record). This Court did not hold an evidentiary hearing in this case, as the parties do not dispute the facts, only the significance of them.

that a counsel's conduct falls within the wide range of reasonable assistance. See id. at 689-90. The inquiry under Strickland is highly deferential and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. The burden is on the defendant to overcome this presumption. Michel v. Louisiana, 350 U.S. 91, 101 (1955). The strategic choices a counsel makes after thoroughly investigating the law and the facts of the case are unlikely to withstand a challenge. Strickland, 466 U.S. at 690-91. The Ninth Circuit has held that counsel must conduct a "reasonable investigation" in order to make informed decisions about how to best represent the client, and must make "reasonable decisions" about what particular investigation is unnecessary. Hendricks v. Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995) (citations omitted). Without an identification of what benefit additional investigation would reveal, a defendant cannot meet the prejudice prong of the Strickland test. Id., 70 F.3d at 1042 (citing James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994)).

CLAIMS

Claim One - trial counsel rendered ineffective assistance by failing to investigate an alternative shooter (Alfred Bennie Lee Jr.) theory of defense.

A. Evidence of Lee Jr.'s "Confession."

Movant alleges that Loyd Tate, Movant's trial counsel, was ineffective in failing to properly investigate an alternative shooter theory. Movant alleges that trial counsel failed to present evidence that Albert Bennie Lee Jr. ("Lee Jr.") confessed to the crimes. In his opening statement, Movant's trial counsel told the jury that it was going to hear that "a couple of other people, yes, Mr. Alfred Bennie Lee Jr. was responsible for this murder." (CVDoc. 2 at 3; CRDoc. 91, at 24-25.) Trial counsel attempted to bring in Lee Jr.'s confession through agent Jones, who was aware of the statement Lee Jr. allegedly made to a Navajo Nation police officer, but the Government's hearsay objection was sustained. (CRDoc. 91, at 107-110.) Trial counsel stated that "[o]ur contention is going to be that Alfred Benny (sic) Lee Jr. confessed to these murders," and argued that the evidence was

1 the “heart” of his case. (Id.) Trial counsel suggested that the statements weren’t hearsay,
2 because they were being introduced to explain agent Jones’s mental state “as to what he
3 then [did in his investigation]” (Id.) Trial counsel also attempted to introduce Lee Jr.’s
4 confession through witness Jessica Lee, by asking her if she was aware of the confession,
5 but again, the Government’s hearsay objection was sustained. (CRDoc. 93, at 56-57.) The
6 trial court instructed the jury at the beginning and end of the trial that statements or
7 questions of counsel are not evidence. (CRDoc. 91, at 6; CRDoc. 95, at 63.) No evidence
8 of Lee Jr.’s confession was ultimately presented at trial. (CVDoc. 2, at 4.)

9 The evidence of Lee Jr.’s confession was provided by the Government to Movant
10 and consisted of private investigator Reuben Martinez’s August 26, 2006, memorandum
11 of a report of telephonic contact with Dorasita Begay (hereinafter “Begay”), a Navajo
12 Nation Police Officer working out of Dilkon, Arizona. (CVDoc. 14-2.) Mr. Martinez
13 reported that Begay told him that she was familiar with the shooting of the victims in this
14 case, and that prosecution witness Jessica Lee had been a friend of Begay’s for most of her
15 life. (Id.) Begay also stated that Jessica Lee had worked for her grandfather, Alfred
16 Bennie Lee Sr., who was a bootlegger on the Navajo nation, and that Lee Sr., would
17 sometimes take firearms in receipt, which Lee Jr., his son, would sometimes sell. (Id.)
18 Begay reported to Martinez that Jessica Lee was known to be a liar especially when under
19 pressure.

20 Begay also told Martinez that two weeks previously she had been involved in a high
21 speed chase involving Lee Jr. (CVDoc. 14-2.) Begay reported that:

22 Lee had two occupants in the vehicle who told her that during the chase Lee,
23 the driver, attempted to load a handgun he had. She was told that the
24 occupants took the weapon away from Lee so he would not do anything
25 stupid if and when he was confronted by the police. She advised that she
26 handcuffed Lee, who she indicated was drunk, and placed him in her patrol
27 car. When Lee complained that the handcuffs were too tight, she attempted
28 to loosen them. Lee broke away from her, and she was eventually able to re-
arrest him after a foot chase.

29 Lee, who suffers from a heart condition, then told her that he was tired of
30 running. He asked her if she remembered the shooting of those two people.
31 She told him that she did. Lee then told her that he was the one that shot
32 them. He told her that he used a 30.06 rifle to shoot them, and that the

1 shooting was over a drug deal that went bad.¹⁰ He indicated that he was
2 owed \$100.00 for drugs he had sold them. Lee asked her if Kendrick
3 (Begay) was okay, as he knew that Kendrick was being charged with the
murders. Begay advised that she told Lee that he was drunk and that he had
better stop talking.
(CVDoc. 14-2.)

4 After learning of the Martinez report, approximately 3-weeks later, FBI agents
5 interviewed Begay at her place of employment, the Navajo Department of Public Safety.
6 (CVDoc. 14-3.) Begay reported that Jessica Lee is her cousin and came to live with her
7 family on and off as a teenager as her father had died and her mother had abandoned her.
8 (Id.) She further related that the basis for her earlier statement to Martinez that Jessica
9 would lie to get out of trouble was based upon her behavior as a teenager sneaking out late
10 at night and cut school with friends. (Id.) Begay also clarified that Lee Sr. is also Lee's
11 grandfather. Lee Jr. is their uncle. (Id.)

12 Begay described her high speed chase of Lee Jr., in more detail to the FBI agents:

13 Approximately one month ago, she was dispatched to a disturbance call at
14 her grandfather's house. Another officer was also dispatched to the call.
15 When they arrived, they were told by her grandfather that "Junior",
16 Raymond Begay, Norbert Begay, and Monica Begay were all at his residence
and were fighting but they had left just before they arrived in Raymond
Begay's red Dodge pickup. Dorasita and the other officer drove around the
17 area and she passed the truck on Indian Route 15. Dorasita did a u-turn and
pursued the truck in order to pull it over the truck pulled away at a high rate
18 of speed. As she pursued, the truck passed several other vehicles in a very
unsafe manner. Dorasita backed off and kept the truck under observation
19 because she did not want the pursuit to cause an accident. Dorasita observed
the truck exit the main road and on to a dirt road and then another dirt road.
20 Dorasita continued to follow but the other unit got separated from them on
the dirt roads. Dorasita realized they were going to Raymond Begay's house
and was close enough to them to see the pickup stop and see "Junior" get out
21 of the driver's side and run around to the back of the house. Dorasita
pursued and found "Junior" sitting down behind the house and handcuffed
22 him then placed him in the back of her patrol car. Norbert Begay and
Monica Begay were still in the truck and Raymond had gone into the house.
23 Monica Begay showed Dorasita a gun that was in the truck and stated that
"Junior" was trying to load it while they were being pursued. Dorasita took
24 the gun and later booked it as evidence. Dorasita did not think it was safe to
attempt a field sobriety check on "Junior" and she knew he had a heart
25 condition and she would not be able to book him into the jail as the Navajo

26
27 ¹⁰During trial, Movant's counsel attempted unsuccessfully to introduce the fact that
28 an anonymous caller had telephoned the police just days after the homicides and stated to the
dispatcher that the killings were for a drug deal gone bad. (CRDoc 91, at 95-101.)

1 Nation has a policy of not accepting prisoners with health issues so she cited
2 him for reckless driving and no driver's license. Dorasita then drove
"Junior" back to his residence in Greasewood Springs.

3 Dorasita said on the way back to the residence "Junior" started
4 complaining about the handcuffs being too tight. Dorasita stopped and got
5 out of the patrol car to loosen the cuffs and as she was doing so, "Junior"
6 was able to get away and ran to the other side of the road. Dorasita pursued
7 and caught "Junior" just as he reached the side of the road. Because of
8 "Junior's" heart condition, he could not run far or fast. After "Junior" was
9 again secured in the vehicle, he stated he was tired of running and wanted to
10 talk to the FBI or a Criminal Investigator (CI), someone he could trust.
11 "Junior" started crying and rambling saying he was the one who shot those
12 kids. Dorasita said she told him she would arrange to have a CI talk to him
13 but she did not want to get involved. "Junior" continued to talk saying, "it
14 was me, I shot him with a 30.06; I didn't mean to shoot the girl." "Junior"
15 did not say how many times he shot he just held his arms up simulating that
16 he had a rifle and she assumed he only shot once. "Junior" also asked if
17 Kenderick was okay. After making these comments, Dorasita told "Junior"
18 he was drunk and to stop talking. Dorasita said when she got "Junior" to the
19 house, his wife, Colleen was there and after she got him in the house, she
20 forgot to get him to sign the citation. Dorasita said she never did talk to a CI
21 about the statements "Junior" made nor did she attempt to contact anybody
22 with the FBI.

23 (CVDoc. 14-2.)

24 Dorasita also told investigators that she was on paid administrative leave because
25 of a public intoxication arrest by the Navajo Police. She did not prepare a report of her
26 encounter with Lee Jr. (CVDoc. 91, at 109.)

27 FBI agents subsequently interviewed Lee Jr. on December 5, 2006. (CVDoc. 14-4.)
28 Lee, Jr. indicated that he is related to Dorasita Begay, and recalled the night that she had
pursued him in her patrol car. (Id.) He told the agents that, at some point during his
contact with Dorasita, "because of his intoxicated state and his level of frustration with the
Navajo Police," he stated to Dorasita, something to the effect of: "[w]hy don't you take
me to jail for killing those kids." (Id.) Lee Jr. said that he was drunk and mad at the
Navajo police and that he had said something like, "[y]ou're always harassing me; you're
always trying to convict me of something; so why don't you just take me to jail for killing
those kids?" (Id.) Lee Jr. denied having anything to do with the shootings and did not
know who was responsible. (Id.)

1 B. Trial counsel's Investigation.

2 Trial counsel stated in his deposition that Movant told him from the beginning of
3 his representation that he was innocent. (CVDoc. 71-1, at 19.) Although trial counsel
4 obtained approval from the Court to pay an investigator to assist him, he did not utilize the
5 investigator to interview any witnesses. (CRDoc. 23; CVDoc. 27, at 5; CVDoc 71-1, at
6 51.) Trial counsel was aware of the "confession" of Lee Jr., and wanted to get it before the
7 jury. (CVDoc. 71-1, at 20-23.) In describing his thought process, trial counsel stated:

8 But I felt that the Government's counterpunch - - I didn't want - - no, let me
9 just say it the way I'm feeling it. I for damned sure didn't want Alfred
10 Bennie Lee Jr. there because he was going to remove all doubt. I wanted to
11 raise some doubt, but I knew she could disprove it what I was going to put
12 out there. So I wanted to get the subject of Alfred Bennie Lee Jr. out there
13 to raise reasonable doubt without having - - giving her the ability to
14 counterpunch or come back at me on this. Because I was weighing out and
15 figured, "Yea, she's going to be able to disprove this. But I wanted to get it
16 out in front of the jury."
17 (Id., at 24.)

18 When counsel for Movant asked trial counsel what was the basis for him saying in
19 his opening statement at trial that the jury would find that Lee Jr. committed the crimes, he
20 responded:

21 If we tried to bring [Lee Jr.] there, she was going to be able to go back and
22 disprove whatever, police officer and all that kind of stuff. I remember
23 asking and knowing that I was going to ask the hearsay question about [Lee
24 Jr.] and I remember being chided by [the trial judge] for asking the hearsay
25 question. But I knew we couldn't - - we didn't have a strong defense with
26 that. So to use other vernacular, I wanted to plant the satchel and run, get
27 [Lee Jr.]'s name out there connected with a confession. But I didn't want
28 [Lee Jr.] there, because I knew that she - - that the Government would walk
us down and - - and zoom in on making [Lee Jr.] if he was there.
(CVDoc. 71-1, at 36.)

29 Movant's trial counsel was confronted with trial witness lists that had included Lee
30 Jr.'s name in an earlier version, but not in a later version, and asked what he would have
31 done if the Government had called Lee Jr. as a witness and he denied committing the
32 offenses:

33 I think we end up having to bring back the officer, what's her name - -
34 whatever her name was, bring her in. And I didn't want to get into her either
35 to bring her in. ...I wanted to get as much mileage as I could without having
36 to call [Lee Jr.] in because I don't expect for him to get on the stand and
37 confess to a double homicide. And, again, I felt the Government was going

1 to have a very effective response. So I wanted to get that in. And sometimes
2 you want to get out as much as you can without having the witness there
3 because of what the Government's going to get out of the witness. I believe
4 that was my thinking for this whole [Lee Jr.] issue.
(CVDoc. 71-1, at 48-49.)

5 To summarize, trial counsel did not attempt to interview, and elected not to call
6 either Lee Jr., or Dorasita Begay as witnesses at trial, for strategic reasons, and thought he
7 could introduce evidence of Lee Jr.'s confession through other witnesses. Trial counsel
8 believed that the confession of Lee Jr. was the heart of his defense.

9 C. Application of law to facts.

10 Movant's trial counsel was aware of the August, 2006, statement Begay made to
11 investigator Martinez, as well as the subsequent interviews by the FBI of Begay and Lee
12 Jr., prior to trial. Trial counsel admitted in his deposition that he did not attempt to
13 interview, or have interviewed either of them, and did not attempt to secure their attendance
14 at trial. He was hoping to admit the "confession" of Lee Jr. through other witnesses, and
15 was confident enough in his ability to do so that he told the jury in his opening statement
16 that Lee Jr. was responsible for the murder. Trial counsel attempted to elicit the confession
17 through agent Jones to show his mental state, and Jessica Lee, to determine whether or not
18 she was "aware" of the confession, but the Court sustained the Government's objections,
19 ruling that the confession was hearsay.

20 Trial counsel's attempt to introduce Lee Jr.'s confession through agent Jones and
21 Jessica Lee was misguided and fell below an objective standard of reasonableness. His
22 arguments to the Court were specious. Hearsay is an out-of-court statement made by a
23 declarant that a party offers in evidence to prove the truth of the matter asserted in the
24 statement. Fed.R.Evid. 801(c). The trial court correctly noted that "the only relevance of
25 [the confession] is for the truth of the matter asserted that [Lee Jr.] confessed to the crime."
26 (CRDoc. 93, at 57.) The trial court then asked counsel, "Is there some other relevance,"
27 to which counsel responded, "No, sir." (Id.) Trial counsel simply could not articulate an
28 evidentiary basis for the introduction into evidence of the confession of Lee Jr. through
another witness.

1 Trial counsel explained his decision not to call either Lee Jr. or Begay during his
2 deposition: that he believed Dorasita Begay to be an unhelpful witness, and that the
3 Government would have a very effective response, that he didn't expect Lee Jr. to confess
4 on the witness stand, and that he expected to introduce the confession through other
5 witnesses so that he could effectively "plant the satchel and run." Trial counsel does not
6 explain what response the Government would have, if Lee Jr. or Dorasita Begay testified
7 at trial. In its pleadings, the Government asserts that trial counsel was "correct in his
8 evaluation of the effectiveness of [] Begay as a witness." (Doc. 67, at 6.)

9 This Court cannot conclude that the evidence the Government has identified that
10 would impeach Dorasita Begay would have the effect of destroying her credibility. Begay
11 had no motive to fabricate Lee Jr.'s confession. She was Lee Jr.'s niece and apparently did
12 everything she could to keep the confession quiet. She encouraged Lee Jr. not to repeat it,
13 as a law enforcement officer should have reported it and didn't, told Lee Jr. that she would
14 have an investigator talk to him but didn't follow up, did not write a report of the incident,
15 and only gave Lee Jr. a reckless driving ticket (which she never had him sign) despite the
16 fact that he fled law enforcement, tried to load a firearm during the chase, and drove
17 intoxicated during a high speed chase with other individuals in the car. If anything, this
18 "impeachment evidence" that trial counsel was concerned about and the Government
19 asserts would destroy Dorasita's credibility is in reality strong evidence of Dorasita's
20 motivation to cover-up Lee Jr.'s confession, and arguably add credibility to it. The fact that
21 she may have ultimately been dismissed as a law enforcement officer for public
22 intoxication is simply evidence consistent with her arguable willingness to compromise her
23 law enforcement duties and responsibilities to protect the interests of a relative. In
24 addition, Begay is a cousin to Jessica Lee, and stated that Lee had worked for Lee Jr.'s
25 father, a bootlegger, and opined that Jessica Lee is untruthful. Begay could have been a
26 witness to the relationship between Lee and Lee Jr., and the credibility of witness Lee.

27 In addition, although Lee Jr. was reportedly intoxicated when he confessed, and
28 subsequently denied the statements, his description of his involvement was detailed enough

1 to lend authenticity to his confession. Lee Jr. told Dorasita that he was “tired of running,
 2 that he “shot those kids,” that he didn’t mean to shoot “the girl,” and that he shot “him”
 3 with a 30.06 rifle, that it was for a drug deal gone bad, and that the victim owed him
 4 \$100.00. Lee Jr. also reportedly sold firearms that his father, Lee Sr., received in payment
 5 as a bootlegger.

6 The Ninth Circuit has repeatedly found that “[a] lawyer who fails adequately to
 7 investigate, and to introduce into evidence, [evidence] that demonstrate[s] his client’s
 8 factual innocence, or that raises[s] sufficient doubt as to that question to undermine
 9 confidence in the verdict, renders deficient performance.” Avila v. Galaza, 297 F.3d 911,
 10 919 (9th Cir. 2002). See also, Vega v. Ryan, 757 F.3d 960, 968 (9th Cir. 2014) (“While
 11 *Strickland* protects strategic choices made after thorough investigation of law and facts,”
 12 had defense counsel known of the victim’s recantation to her clergyman, “there was no
 13 strategic reason for not calling [the clergyman] as a witness.”) (internal quotes and citation
 14 omitted). Any argument that evidence of Lee Jr.’s confession would have harmed
 15 Movant’s case is incredible. The evidence supported Movant’s theory of defense, and the
 16 fact that it was not admitted deprived the jury of the opportunity to consider this evidence
 17 and decide its significance. Trial counsel’s performance with regard to this evidence fell
 18 below an objective standard of reasonableness.

19 Claim Two - trial counsel rendered ineffective assistance by failing to
 20 investigate and present evidence that Movant did not have access to the
 weapon used in the homicide (pawn shop evidence).

21 A. Evidence of Pawn Shop Records.

22 The evidence at issue consists of pawn shop records from T&R Market, Inc., which
 23 show that on January 5, 2002, Movant pawned a rifle - a Norinco SKS rifle. (CVDocs. 12-
 24 1, 12-2.) It is undisputed that trial counsel was aware of these records prior to trial.

25 B. Trial Counsel’s Investigation.

26 Testimony at trial established that the firearm used to shoot the victims was a rifle
 27 capable of shooting .30 caliber bullets. Clark testified that three or four weeks prior to the
 28 shootings, he had gone shooting with Movant, and that Movant had an SKS rifle that, when

1 shot, sounded like the rifle he heard the night of the shooting. (CRDocs. 91, at 140; 93, at
2 9.) He testified that the SKS rifle that he had previously shot with Movant “had a folding
3 stock, a 30-round clip, and it had a bayonet.” (CRDoc. 91, at 140.) Clark also testified that
4 he told investigating officers that Movant had pawned all of his guns, and did not deny that
5 he had gone with Movant to pawn the weapon at T&R Market (CRDoc. 93, at 17.)

6 During his deposition, trial counsel admitted that he had not done any investigation
7 into the pawn shop records, for instance, to discover whether or not the SKS rifle in pawn
8 “had a folding stock, a 30-round clip, and a bayonet” or whether or Clark could identify it
9 as the one he had shot with Movant on the previous occasion, because he knew that the
10 pawn shop evidence “would show that [Movant] pawned an SKS, not necessarily the SKS.”
11 (CVDoc. 71-1, at 29.) Trial counsel was concerned that, “we were going to be able to
12 show that, yes, he pawned some weapons[,] [b]ut the Government was going to be able to
13 come back and counterpunch and show, I think through Mr. Clark, that we - - that [Movant]
14 went firing the SKS after this was pawned. ... And, again, my thought was what can - - how
15 can we put out a defense without the Government coming back with a devastating
16 response.” (*Id.*, at 26.) Trial counsel was also concerned that the pawn shop records would
17 know that Movant knew how to shoot an SKS-style rifle and had actually owned one.
18 (CRDoc. 71-1, at 63.)

19 The most obvious flaw in trial counsel’s explanation for failing to investigate the
20 pawn shop record relating to the SKS rifle is that Clark did testify at trial that he had shot
21 an SKS rifle with Movant three to four weeks before the homicides; thus, the damaging
22 evidence was before the jury. Despite this, the pawn shop records were consistent with a
23 plausible argument that this SKS rifle was in pawn prior to the shootings for several
24 reasons: (1) Clark told investigators in 2002 that Movant had pawned his guns before the
25 shooting, (2) Clark’s statement that he had gone shooting with Movant 3 to 4 weeks before
26 the homicides was given 5-years after the homicides, and, under that circumstance, is not
27 that far off from the actual 11-week interval between the time the rifle was pawned and the
28 homicides, and (3) Clark initially lied to investigators about the homicides, and did not

1 ultimately reveal the “truth” until 4 years after the murders. The cumulative affect of this
2 evidence bears directly on Clark’s memory and credibility. Also, trial counsel raised the
3 issue at trial about Movant having some “guns” and that they had all been pawned, and that
4 Clark had been with Movant when they were pawned, during cross-examination of Clark.
5 (CRDoc. 93, at 17.) Thus, further evidence that Movant was familiar with or owned a rifle
6 would not have undermined trial counsel’s argument that any firearms that Movant owned
7 were in pawn at the time of the homicides.

8 Trial counsel does not adequately explain why he did not further investigate the
9 pawn shop records, or how a compelling argument could not have been made that Movant’s
10 SKS rifle, which Clark so vividly described, was pawned a few months prior to the
11 homicides. The only “counterpunch” by the Government would be to highlight the
12 evidence already before the jury, that is, the accuracy of Clark’s recollection of when he
13 and Movant had gone out together to shoot a rifle, and the fact that the pawn shop records
14 do not conclusively prove that Movant did not have access to a different rifle to carry out
15 the homicides.

16 It is difficult to conceive how this evidence would have hurt the defense in this case,
17 and even harder to conceive of how it would not have been helpful to the defense. Trial
18 counsel’s failure to further investigate the pawn shop records, or to seek their introduction
19 into evidence fell below an objective standard of reasonableness.

20 PREJUDICE

21 Movant must affirmatively prove prejudice by “show[ing] that there is a reasonable
22 probability that, but for counsel’s unprofessional errors, the result of the proceeding would
23 have been different. A reasonable probability is a probability sufficient to undermine
24 confidence in the outcome.” Strickland, 466 U.S. at 694. The prejudice component
25 “focuses on the question whether counsel’s deficient performance renders the result of the
26 trial unreliable or the proceeding fundamentally unfair.” Lockhart v. Fretwell, 506 U.S.
27 364, 372 (1993) (citing Strickland, 466 U.S. at 687).

1 Due to trial counsel's failure to investigate and present evidence of Lee Jr.'s
2 confession, Movant was deprived of the right to fully defend his case. "Few rights are
3 more fundamental than that of an accused to present witnesses in his own defense."
4 Chambers v. State of Mississippi, 410 U.S. 284, 301 (1973). In Chambers, the defendant
5 had been charged with the murder of a state trooper, and, during trial, was limited by the
6 court in the cross-examination of a witness who had confessed to having been the shooter.
7 The witness admitted that he had confessed, but recanted, asserting that a clergyman had
8 talked him into confessing by promising that the witness would not go to jail and would
9 share in proceeds of a putative false arrest lawsuit. (Id., at 1044). Defendant was
10 prevented by the court from treating the witness as an adverse witness, or challenge directly
11 the witnesses renunciation, and furthermore, was prevented from introducing the testimony
12 of three other witnesses who separately had heard the witness confess. (Id.) The United
13 States Supreme Court reversed the defendant's conviction, noting that,

14 In the exercise of [the fundamental right to present witnesses in his own
15 defense], the accused, as is required by the State, must comply with
16 established rules of procedure and evidence designed to assure both fairness
17 and reliability in the ascertainment of guilt and innocence. Although perhaps
18 no rule of evidence has been more respected or more frequently applied in
19 jury trials than that applicable to the exclusion of hearsay, exceptions tailored
20 to allow the introduction of evidence which in fact is likely to be trustworthy
21 have long existed. The testimony rejected by the trial court here bore
22 persuasive assurances of trustworthiness and thus was well within the basic
23 rationale of the exception for declarations against interest. That testimony
24 was critical to Chambers' defense. In these circumstances, where
25 constitutional rights directly affecting the ascertainment of guilt are
26 implicated, the hearsay rule may not be applied mechanistically to defeat the
27 ends of justice.

28 (Id., at 302).

22 In Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013), the Ninth Circuit Court of
23 Appeals found that it was objectively unreasonable for the state court to conclude that trial
24 counsel rendered effective assistance when he failed to interview a witness who would
25 testify that the victim fabricated her allegations of molestation and stated a motive for
26 doing so. 706 F.3d at 1162. The Court then found that, in determining prejudice, "[it] must
27 first consider whether [the evidence] could have been admitted at trial," ... and "[i]f the
28 evidence could have been admitted, [] whether there was a reasonable probability that it

1 would have affected the outcome of the proceeding.” *Id.*, at 1163. “What matters is
 2 whether a competent lawyer would have been able to introduce the evidence, in some form,
 3 at trial.” (*Id.*) (citing *Wiggins v. Smith*, 539 U.S. 510 (2003)).

4 A defendant has a clearly established federal constitutional right to present a
 5 complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The right to present
 6 relevant evidence is not unlimited, but subject to “reasonable restrictions, such as
 7 evidentiary and procedural rules.” *Moses v. Payne*, 543 F.3d 1090, 1101 (9th Cir. 2008)
 8 (citation and internal quotes omitted); 555 F.3d 742 (amended on den. of rehrg).
 9 “Evidentiary rules do not violate a defendant’s constitutional rights unless they ‘infring[e]
 10 upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes
 11 they are designed to serve.’” *Id.*, at 1102, 757 (citing *Holmes v. South Carolina*, 547 U.S.
 12 319, 326 (2006)). It is difficult to narrow to one the evidentiary or procedural rule which
 13 would have supported the admission of Lee Jr.’s confession at trial, because Movant’s
 14 counsel did nothing to discover if Lee Jr. or Begay were available to testify, failed to
 15 interview them, and failed to educate the trial judge adequately as to the confession and all
 16 of the circumstances surrounding it. There are a multitude of conceivable avenues,
 17 however: (1) Lee Jr. testifying consistent with his confession - not hearsay, relevant; (2)
 18 Lee Jr. testifying inconsistent with his confession - impeachment with prior inconsistent
 19 statement; (3) Lee Jr. declared unavailable - confession admitted as statement against
 20 interest having sufficient indicia of trustworthiness/residual exception to the hearsay rule;
 21 (4) Lee Jr. testifying inconsistent with his confession, denies confession - Begay called as
 22 a witness to impeach Lee Jr. Trial counsel explored none of these avenues of admissibility.

23 “[E]xceptions tailored to allow the introduction of evidence which in fact is likely
 24 to be trustworthy have long existed.” *Chambers*, 410 U.S. at 302. “[T]he exclusion of
 25 [separately tried co-defendant’s statement exculpating defendant] cannot be justified
 26 merely by shouting hearsay!” *Rivera v. Director, Dept. of Corr., State of Ill.*, 915 F.2d 280
 27 283 (7th cir. 1990). *See also, Welcome v. Vincent, Sup., Greenhaven Corr. Facility*, 549
 28 F.2d 853, 859 (2nd Cir. 1977) (“to restrict examination of a witness, so that his prior

1 confession may not be proven, is to deny the defendant a fair trial, at least when the
2 confession, though retracted, has some semblance of reliability.”). The confession of Lee
3 Jr. bore indicia of trustworthiness: he was emotional when he confessed, his confession was
4 to a close confidant, he described facts about the murders suggesting his personal
5 involvement, said he shot the victim with a rifle and didn’t mean to shoot the female victim,
6 his statement about the killings being over a “drug deal gone bad” was consistent with an
7 anonymous call received by police after the murders, and Lee Jr. worked for his father, a
8 bootlegger, and traded guns for alcohol. The evidence against Movant consisted of the
9 testimony of Clark and Lee. There was no physical evidence linking Movant to the
10 homicides. Jessica Lee was highly intoxicated and did not observe the shootings, and
11 additionally is related to Lee Jr., and also worked for Lee Sr., the bootlegger. Clark was
12 initially dishonest with investigators, and did not provide his trial account until years after
13 the murders.

14 In consideration of the trial evidence, along with the confession of Lee Jr., as well
15 as evidence that Movant pawned a rifle consistent with the one used in the shooting just
16 weeks before the shootings, the Court concludes that the errors of counsel had a substantial
17 and injurious effect on the jury, in that it was deprived of hearing all of the relevant
18 evidence in the case. There is a reasonable probability that, but for counsel’s
19 unprofessional errors, the result of the proceeding would have been different.

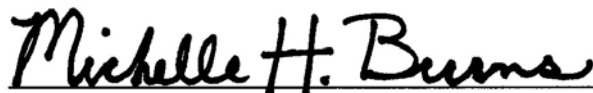
20 CONCLUSION

21 This Court having found a denial or infringement of Movant’s constitutional rights
22 that affected his right to a fair trial, this Court will therefore recommend that Movant’s
23 §2255 motion be granted, that judgment be set aside, and that a new trial be granted.

24 **IT IS THEREFORE RECOMMENDED** that Movant’s Motion Under 28 U.S.C.
25 § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (CV Doc.
26 1; CR Doc. 111) be **GRANTED**, that judgment be set aside, and that Movant be granted
27 a new trial.

1 This recommendation is not an order that is immediately appealable to the Ninth
2 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
3 Appellate Procedure, should not be filed until entry of the district court's judgment. The
4 parties shall have fourteen days from the date of service of a copy of this recommendation
5 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);
6 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen
7 days within which to file a response to the objections. Failure timely to file objections to
8 the Magistrate Judge's Report and Recommendation may result in the acceptance of the
9 Report and Recommendation by the district court without further review. See United
10 States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file
11 objections to any factual determinations of the Magistrate Judge will be considered a
12 waiver of a party's right to appellate review of the findings of fact in an order or judgment
13 entered pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules
14 of Civil Procedure.

15 DATED this 7th day of November, 2014.

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18 Michelle H. Burns
19 United States Magistrate Judge
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